NO. 78-1755

In the Supreme Court of the United States

OCTOBER TERM, 1978

VALENTINE JANICKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported; Slip Op. No. 77-2258, has been filed with this Court simultaneously with the filing of this Petition as a separate, joint Appendix of Petitioner. The Order of the Seventh Circuit denying Defendant Janicki's Petition for Rehearing is also contained in the joint Appendix.

II.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing was entered on April 23, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1). This petition for a Writ of Certiorari is filed within thirty days of that order.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's Fifth Amendment right to Due Process of Law, as defined by this Court in *Brady* v. *Maryland,* is violated where, despite a specific pre-trial request from the defendant, the prosecutor intentionally withholds clearly exculpatory evidence from the defendant until the opening statement of the government's case.

2. When co-defendants assert directly conflicting defenses, may a denial of separate trials be sustained based on the reviewing court's supposition of a theory of defense never recognized, advanced or submitted to the jury in the lower court by any party or by the trial judge.

IV.

CONSTITUTIONAL PROVISIONS INVOLVED
UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

V.

STATEMENT OF THE CASE

In 1977, a federal grand jury in Chicago returned an indictment charging the petitioner, Valentine Janicki, along with seven others, with the offenses of conspiracy, interstate travel in aid of racketeering, wire fraud and the filing of false income tax returns. Janicki was charged individually with conspiracy, seventeen counts of inter-state travel in aid of racketeering, fourteen counts of wire fraud and two counts of filing false income tax returns. Plainly stated, the indictment charged that Frederick B. Ingram, chairman of the board of the Louisiana-based Ingram Corporation, had paid Robert F. McPartlin, an Illinois Legislator, Valentine Janicki, a trustee for the Metropolitan Sanitary District, and others more than $900,000 to secure for the Ingram Corporation a multi-million dollar sludge hauling contract with the District.

1. BACKGROUND

The Metropolitan Sanitary District of Greater Chicago is a municipal corporation organized under the laws of the State of Illinois operating under the corporate authority

of a nine member board of trustees (Tr. 116).* The district is charged with the responsibility for treating and disposing of sewage which is generated within its boundaries. Over the years, it had employed several methods of sludge disposal, all of which were impracticable or over-used by 1970 (Tr. 129). In response to the problem, its technical staff outlined various possible alternative solutions (Tr. 134), including the use of railroads and a barge company for the transportation of the sludge for purposes of disposal (Tr. 135-136). The cost of such transportation over a 3 year period was estimated at $17,100,000 (Tr. 140) and, accordingly, bids to haul the sludge were solicited.

Between March 24, 1971 and April 14, 1971, various bids were submitted, including one from the Ingram Company in the amount of $21,538,994.25 (Tr. 162); later revised to $20,019,100 (Tr. 164). On April 15, 1971, Ingram Company submitted yet another bid for $16,990,000. During the course of a subsequent meeting with the Sanitary District Staff, an Ingram official stated that a $1,000,000 mistake had been made in Ingram's then most recent bid and as a result, Ingram increased the bid upward to $17,990,000 (Tr. 172-173). On April 22, 1971, the sanitary district's board of trustees awarded the sludge contract to the Ingram Company (Tr. 177-178). The actual contract was not signed, however, until May 12, 1971. In the interim, between the award and signing, the details of the contract were negotiated (Tr. 180). The contract was subsequently revised in an agreement approved by the board of trustees on November 30, 1972 (Tr. 210-211).

2. SEVERANCE

The Government's theory was that Vaientine Janicki, Robert McPartlin and others, (the "Chicago defendants") received payments of money as bribes to influence the

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* Citation is to transcript of trial below.

award of the contract in favor of Ingram. It was also asserted that these individuals received further payments to modify the contract. The alleged payments were, according to the Government, paid by Fredrick Ingram to William J. Benton, a vice-president of Ingram Corporation, an unindicted co-conspirator and the key witness for the prosecution. Benton, who was conducting negotiations for the Ingram Corporation in Chicago, then allegedly paid over these monies to the various "Chicago defendants."

The defense proffered by Frederick and Bronson Ingram, (the "Ingram defendants") was similar to that of the prosecution: the Ingrams admitted the payments, but contended they were not bribes but payments made out of fear of economic harm. In essence, the Ingram's claimed that they were victims of extortion (Tr. 3934-3937). Their defense sharply conflicted with that of the remaining defendants that no payments, whether characterized as bribes or extortion, were ever made.

The prospect that the trial would involve mutually exclusive and completely antagonistic defenses was made known to the trial court during the pre-trial motion stages. The "Ingram defendants" initially filed a severance motion which stated specifically that the defenses were severely in conflict. A supplemental memorandum stated that the "Ingram defendants" intended to prove "the reputation of Chicago public officials for requiring illicit payments in connection with public contracts. . . ." Finally, in their renewed motion for severance, the Ingrams advised the trial court that they had made payment to the "Chicago defendants" as part of an extortion scheme that was "conceived, devised and implemented throughout by the Chicago defendants." In addition, the Ingram defendants asserted that they would prove their case through both their own and the Government's witnesses and that

"their posture throughout [the] case . . . would be the prosecution of the Chicago defendants."

In their opening statements, the "Ingram defendants" admitted making payments to the Chicago defendants. (Tr. 57). The Ingram defendants, consistent with the representation made in their pre-trial motions for severance, cross-examined Benton with the intent to support the Government's theory of the case, reiterating that payments were made by Benton to the "Chicago defendants." (Tr. 1455-1458). At the close of their cross-examination of Benton, defendant Janicki moved for a severance. This was denied (Tr. 1505). Following the completion of the Ingrams' cross-examination of Benton, the trial court restricted the extent to which the other defendants could cross-examine Benton:

> Let me make clear that there will be no repetition and there will not be any exhaustive detail about these extra-curricular activities of his (Benton's) either.[1] It is out, and I think it is out in sufficient detail, unless there is something new, some new transaction that has not been gone into. So whatever Mr. Neal has covered, do not get the idea that anybody else is going to cover the same fraud with just a little different slant to it because I will not permit that (Tr. 1505-1506).

During its rebuttal case, the Government offered evidence that Frederick Ingram had been involved in another bribery scheme regarding a Brazilian public official (Tr.

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[1] The government revealed for the first time in the opening statement that Benton had admitted keeping over $375,000 of the money given to him by the Ingrams for delivery in Chicago. The trial court's directive therefore precluded defense counsel from further exploring the various aspects of Benton's lifestyle—expensive homes, cars, etc.—an inquiry necessary to determine if Benton was in severe need of this money and, if so, if he had kept a greater portion if not all of the money than he had admitted.

5665-5666). The Ingram defendants objected to the admission of this evidence as being highly prejudicial. The defendant Janicki also objected to this evidence, since the scheme in which Ingram had been involved at an earlier date with the Brazilian official paralleled exactly the Government's case against Janicki. Essentially, Janicki argued that this evidence was irrelevant and highly prejudicial as to him and that a limiting instruction by the trial court to the effect that the evidence should only be considered as to the Ingram defendants would be insufficient. This objection was overruled.

3. DISCLOSURE OF EXCULPATORY EVIDENCE

Prior to trial, defendant Janicki filed a Motion under *Brady* v. *Maryland*, 373 U.S. 83 (1963), for the disclosure of evidence favorable to the defendant. A *Brady* motion was also filed on behalf of the Ingram defendants and adopted by Janicki. The Ingram motion requested, *inter alia*, materials showing "that Benton took funds and property from Ingram Corporation or any of its subsidiaries," and materials showing "that during the time he was employed by Ingram Corporation, and unknown to Federick B. Ingram or E. Bronson Ingram, Benton took substantial payments, in property or cash, from third parties." The Government refused the request.

In a minute order dated October 22, 1976, the trial judge denied the defendant's specific request for discovery of this information relating to any defalcation made by Benton (R. II, 25).[2]

In its opening statement, the prosecution for the first time disclosed that William J. Benton, the intermediary between the Ingrams and the Chicago defendants and the one who had informed the Ingrams of the alleged demands

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[2] Citation is to certified record in the Court below.

for money from Chicago, had admitted keeping $375,000 of the money that the Ingrams had given to him for purposes of paying the "Chicago defendants" (Tr. 48). Benton had made reference to these monies before the Grand Jury on April 28, 1976, but had misrepresented the facts so as to prevent the Grand Jury from realizing that he had stolen this money. The government also revealed that it had known for almost two years prior to trial that Benton had embezzled these funds (Tr. 238).

That this exculpatory evidence had not been made known to the defense prior to trial was immediately brought to the attention of the trial court (Tr. 52, 106, 221-231). After a lengthy colloquy, the trial court agreed that the information with respect to Benton's defalcation was *Brady* material (Tr. 224). Moreover, the trial court then stated that had he known that this was the type of information to which the defendants were referring in the specific pretrial *Brady* requests, he would have granted their motion (Tr. 247). The trial court also noted that the information the government did turn over to the defense relating to Benton's appropriations was so vague as to be of no use to the defendants: "[T]he better procedure here would have been for the Government simply to come out and say that Benton took their money. It should not have been left to inference. It should have been stated" (Tr. 247).

Defendant Janicki and all other defendants made alternative motions at this juncture for judgments of acquittal, dismissal of the indictment, the barring of Mr. Benton from testifying, or a recess for a reasonable length of time to pursue additional investigation (Tr. 249). The trial court denied all of these motions (Tr. 250). In addition, on September 19, 1977, 7 days after the disclosure of this material, and one day prior to defendant Janicki's cross-examination of William Benton, the trial court restricted the scope and extent of all defense cross-examination of Benton (*see* p. 6 of this petition, *supra*).

After a nine-week trial of all defendants, the case was submitted to the jury. With respect to defendant Janicki, the jury returned a verdict of guilty on the one count of conspiracy, fifteen counts of inter-state travel in aid of racketeering, thirteen counts of wire fraud and two counts of filing false income tax returns. Janicki was sentenced to ten years in prison and fine $80,000.

VI.

THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED

Janicki first asserted his Fifth Amendment right to due process by making a specific pre-trial request for *Brady* material from the Government. This right was next asserted through motions for a continuance, for a judgment of acquittal and for dismissal of the indictment when the Government first disclosed highly exculpatory evidence in its opening statement. Finally, Petitioner asserted this right on appeal to the United States Court of Appeals for the Seventh Circuit. That court affirmed his conviction with respect to this issue as well, holding that the mandate of *Brady* v. *Maryland*, 373 U.S. 83, did not apply to late disclosures of exculpatory material and that the defendant had not been prejudiced as a result of this late disclosure.

The Petitioner Janicki first raised his Sixth Amendment right to a fair trial by requesting a severance from the Ingram defendants in a pre-trial motion. Janicki renewed this motion during the course of the trial. It was next raised on appeal to the United States Court of Appeals for the Seventh Circuit; that court affirmed his conviction on March 26, 1979, holding that the trial court had not abused its discretion in failing to grant a severance and thus the defendant's right to a fair trial had not been violated.

On April 23, 1979, the Seventh Circuit denied Petitioner Janicki's Petition for a Rehearing.

VIII.

REASONS FOR ALLOWING THE WRIT

A. To Answer The Important Constitutional Question That Was Specifically Left Open By This Court's Decisions In Brady v. Maryland, United States v. Agurs And Weatherford v. Bursey And To Resolve Conflicting Views Of The Various Circuits: Whether A Defendant's Constitutional Right To Due Process Of Law Under The Fifth Amendment Is Violated When A Prosecutor Intentionally Fails To Disclose Highly Exculpatory Evidence, Until The Government's Opening Statement, Despite A Specific Pre-Trial Defense Request For Such Information.

This case provides the Court with the opportunity to decide the presently unanswered question as to at what stage of a criminal prosecution does the principle of due process oblige a prosecutor to disclose highly exculpatory evidence.

In *Brady* v. *Maryland*, 373 U.S. 83, this Court held that a defendant's right to due process was violated where the prosecution suppressed favorable evidence until *after* the defendant had been convicted. As a result, a prosecutor now is required by the Constitution to disclose to the defendant any exculpatory evidence that is material to that individual's guilt or innocence. This Court, however, left open in *Brady* the question of *when* the prosecution must make such a disclosure in order to comport with due process.

In *United States* v. *Agurs*, 427 U.S. 97, this Court again addressed the issue of prosecutorial disclosure of exculpatory evidence. In *Agurs*, clear standards were set forth as to what type of evidence was sufficiently material to

require disclosure. Yet, there, as in *Brady*, this Court failed to decide at what time a prosecutor must turn over evidence to a defendant when it is already established that such evidence actually is "*Brady* material" and thereby must, at some point, be disclosed.

Finally, in this Court's most recent decision regarding prosecutorial disclosure, it was held that *Brady* does not require a prosecutor to turn over *inculpatory* evidence to the defense prior to trial. *Weatherford* v. *Bursey*, 429 U.S. 545. Specifically, it was stated that "[it] does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably." *Id.* at 545. Thus, although *Weatherford* dealt with the timing of prosecutorial disclosure of unfavorable evidence, it clearly is not controlling where late disclosure of *exculpatory* evidence is involved; this important constitutional question continues to remain unresolved.

Accordingly, in the absence of a definitive statement from this Court, lower federal courts are employing a variety of *ad hoc* methods to determine when a prosecutor must turn over *Brady* material in order to avoid violating a defendant's Fifth Amendment rights. *See* Note, *the Prosecutor's Duty of Disclosure From Brady To Agurs and Beyond*, 69 J. Cr. Law and Crim. 197, 217-18 (1978); Note, *Brady* v. *Maryland and the Prosecutor's Duty to Disclose*, 40 U.Ch.L.Rev. 112, 117-18 (1972). Thus, it has been held that under *Brady* "[d]isclosure by the Government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation of its case, even if satisfaction of this criteria requires pre-trial disclosure. . . ." *United States* v. *Pollack*, 534 F.2d 964, 973 (D.C.Cir. 1976). *Accord Grant* v. *Alldredge*, 498 F.2d 376 (2d Cir. 1974); *United States* v. *Elmore*, 423 F.2d 775 (4th Cir. 1970), *cert. denied*, 400 U.S. 825; *See*

also United States v. *Deutsch*, 373 F.Supp. 289 (S.D.N.Y. 1974); *United States* v. *Houston*, 339 F.Supp. 762 (N.D. Ga. 1972). Other courts, however, have decided directly to the contrary, stating that *Brady* never requires pretrial disclosure of exculpatory evidence, *United States* v. *Moore*, 439 F.2d 1107 (6th Cir. 1971) and that the principles of *Brady* are inapplicable in cases of late disclosures of exculpatory material,[3] and that in such cases the only question is whether the defendant has suffered any "actual prejudice" as a result of the late disclosure.[4] *United States*

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[3] Certainly, it would appear that courts which have determined that *Brady* is inapplicable in cases of late disclosure of exculpatory evidence are at odds with this court's pronouncements in *United States* v. *Agurs*, *supra* at 107:

> The problem (referring to *Brady* disclosure) arises in *two* principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, a prosecutor must decide what if anything he should voluntarily submit to defense counsel. Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically, the same standard [to determine whether a failure to disclose at the particular time in issue] must apply at both times.

[4] In determining whether a defendant has been prejudiced by late disclosure of *Brady* material, courts have looked at various factors, including: whether the defendant was granted a continuance at the time the evidence was disclosed, *United States* v. *Coppolla*, 526 F.2d 764 (10th Cir. 1975); whether the defendant was given an adequate opportunity to cross-examine the surprise witness who was connected with exculpatory evidence, *United States* v. *Donatelli*, 484 F.2d 505 (1st Cir. 1973); and, whether defense counsel had an "opportunity to go into the matter at trial". *United States* v. *Valdivia*, 492 F.2d 199 (9th Cir. 1973). At least one court cited no factors used in making its determination, simply stating: "[s]uffice it to say that we have considered the record and are of the opinion that government counsel and the trial judge discharged their duties under *Brady*. . . ." *United States* v. *Rochan*, 575 F.2d 191, 198 (8th Cir., 1978), *cert. denied*, 99 S.Ct. 564. Even under the restrictive stan-

(footnote continued)

v. *Miller*, 529 F.2d 1125 (9th Cir. 1976); *United States* v. *Stone*, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931; *United States* v. *Cole*, 449 F.2d 194 (8th Cir. 1971). Finally, at least one court has recognized the difficulty in determining what actually is the correct constitutional standard in this area: "The prosecutor's obligation to furnish exculpatory material to the defense in a criminal case is firmly established. Not always as clear, however, is the time when the duty must be performed," *United States* v. *Kaplan*, 554 F.2d 577 (3rd Cir. 1977).

Consequently, as a result of the present *ad hoc* manner in which this critical constitutional issue is being adjudicated, reviewing courts have been hesitant to reverse convictions which are obtained, in part, by withholding exculpatory evidence from the defendant until it is too late for him to effectively present it to the jury. *See* Note, 40 U. Chi. L. Rev., *supra* at 117. As a result, prosecutors presently have a free hand to disclose *Brady* material at whatever time they think it would do the least harm to their case without fear of a reversal; the defendant, on the other hand, is left without an effective remedy to combat such intentional suppression of evidence.[5]

(footnote continued)
dards set up by these courts, Petitioner Janicki would have been found to have been prejudiced by the prosecutor's late disclosure. Here, unlike in *Donatelli*, he was not given "an adequate opportunity to cross-examine the witness who had revealed the exculpatory evidence". Nor did Janicki receive a continuance, as did the defendant in *Coppolla*.

[5] A continuance is the most commonly used judicial remedy a prosecutor discloses *Brady* material at trial. *See, e.g.*, cases cited on pgs. 11-12, *supra*. The effectiveness of such a remedy, however, is doubtful:

> A continuance will not adversely compensate the defense for nondisclosure of material information, not to mention the fact that jurors are likely to lay the blame for continuing delays on the defense.

Moore, FEDERAL PRACTICE ¶ 16.06 (2) at 16-100.

The instant case provides a graphic example of how far the prosecutor can go in arranging a "trial by ambush," under the present *ad hoc* system used in determining the proper timing of disclosure of *Brady* material. The prosecution knew over two years prior to trial that William J. Benton had embezzled at least $330,000 of the monies that the Ingrams had given to him to pay the alleged demands for money from Chicago. (Tr. 48). The defendants, including the Petitioner, made a specific pretrial request for such information and the Government refused to provide it. (R.I. 16). Then, in opening statement, the Government finally revealed that Benton had indeed embezzled this money. That this information clearly was *Brady* material of critical importance is not at issue here; the prosecution and the trial court both admitted as much at trial (Tr. 224).

Indeed, the Seventh Circuit, itself, in its opinion in this case, noted that the fact that Benton had kept this money made it conceivable that he kept all of it. *United States* v. *McPartlin, et al., supra* at 12-13 and R. 9. Unfortunately, what the Seventh Circuit failed to realize was that the defendants, because of the late disclosure of the evidence, were unable to effectively present to the jury that very defense. First, as the disclosure came in the first day of the trial, none of the defense counsel had the time to conduct a thorough investigation to determine if Benton had, indeed, kept all of the money.[6] Second, the trial court denied motions for continuance for the purpose of making

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[6] Certainly, it would be difficult for these attorneys, who were litigating the case every day for nine weeks, to conduct the investigation in their "free time."

that very type of investigation.[7] Finally, before defense counsel could attempt to explore the possibility that Benton kept all the money through cross-examination of Benton himself, the trial court imposed a restriction on that very type of question. *See* pg. 6, *supra*. Thus, all of these factors combined to prevent the defendant from effectively presenting what is admitted by all of the parties to be the most logical and effective defense that was available to him.

Despite the Seventh Circuit's recognition of the value of the potential defense that was effectively taken from the defendant as a result of the prosecution's suppression of the exculpatory evidence and the trial court's rulings with respect to explanation of that evidence at trial, the Court still ruled that the defendant's due process right to a fair trial was not violated. The Seventh Circuit, stating that *Brady* "addresses a thoroughly different problem" than that presented in the instant case, held that the standard in these cases is whether the disclosure comes so late as to prejudice the defendant, *United States* v. *McPartlin*, *supra* at 39. It then went on to hold that disclosure did not come so late in this case as to prejudice the defendant.[8]

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[7] Even if the trial court had granted such a continuance, the defense would have been hard pressed to investigate in a few days what it took the government two years of constant investigation to put together.

[8] The Seventh Circuit's decision is confusing, not only in light of the facts of this case, but in light of its own recent pronouncement in *MacDonald* v. *State of Illinois*, 557 F.2d 596 (7th Cir. 1977), *cert. denied*, 434 U.S. 996: "A defendant's right to prepare the best defense he can and to bring to the court's attention any evidence helpful to . . . [his] case is constitutionally protected." *Id.* at 603. Clearly in the instant case, the defendant was unable to exercise this most important constitutional right to prepare the best defense available to him.

Legal commentators have uniformly criticized the present system for giving prosecutors too much discretion in the timing of *Brady* disclosures. *See* NAKELL, *Criminal Discovery For The Defense and Prosecution—The Developing Constitutional Standards*, 50 N.C.L.REV. 437 (1972) and commentators cited therein. Moreover, these same commentators have noted that, if a defendant is going to be provided with the full due process protection that was outlined by this Court in *Brady*, articulable standards that would require a prosecutor to turn over obvious *Brady* material as soon as he was aware of it—be that before or during trial[9] must be developed. Note, 69 J.Cr. Law and Crim at 217, *supra;* Moore, *supra* §16.06 (2) at 16-94; Note, 40 U.CHI.L.REV. *supra* at 117. *Cf.* Note, *A Proposed Rule of Criminal Pre-trial Discovery*, 4 U. COLO.L.REV. 443 (1978) (calling for full disclosure of all evidence to the defendant before trial). Clearly then, in light of the complete lack of any existing identifiable standards in the lower courts, and the obvious need for such a constitutional standard, it is necessary for this Court to set forth the appropriate constitutional guidelines.

In the absence of the pronouncement of a clear articulable standard, setting forth the constitutional duties of a prosecutor with respect to disclosure of *Brady* material, it is doubtless that the type of "trial by ambush," exhibited in

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[9] Indeed, existing ABA standards require this very thing: "The prosecutor should [make these disclosures] as soon as practicable following the filing of charges against the accused. "ABA STANDARDS Relating to Discovery and Procedure Before Trial §2.2(a) (approved draft 1970). Similarly, the ABA STANDARDS Relating to the Prosecution Functions and Defense Function, state that "[i]t is unprofessional conduct for a prosecutor to fail to disclose to the defense *at the earliest feasible opportunity* evidence which would *tend to negate the guilt of the accused*. . . ." ABA STANDARDS, *supra* at § 3.11 (Tentative Draft 1968).

the instant case, will continue. As a result, our adversary system will degenerate into the type of "poker game" that this Court has often counseled against. *See Wardius* v. *Oregon,* 412 U.S. 470; *Williams* v. *Florida,* 399 U.S. 78.

B. This Court Should Set The Standards As To When The Appellate Court May Refuse To Follow The Theories Of The Case In Deciding Whether The Trial Court Abused Its Discretion In Denying Co-Defendants Severance Motion.

The Ingram defendants, throughout the case, from opening statement to closing argument, contended that, although they were accused of bribery, they were, in fact, victims of the Chicago defendants and were, in fact, extorted by them and, thus, without the criminal intent required to prove the offenses charged. This "extortion defense" was the mainstay of their presentation, cross-examination and argument.

The Chicago defendants, on the other hand, and in particular, Petitioner Janicki, contended that not only had they not extorted any money, but they had not received the funds alleged to have been paid to them.

The denial of petitioner's motions for severance on the grounds of antagonistic defenses was rejected by the court below on the grounds that:

> "[I]t was not necessary to this defense that the Illinois defendants were guilty of extortion or received bribes, because it was possible that Benton, through whom the corporation's communications with, and payments to, the Illinois defendants, were carried out, did not pass any of the money on but kept it all himself." (Op. pp. 12-13)

The court footnoted the more precise facts, as developed in the case below, stating, "Benton admitted siphoning off for his own use *some of the funds* that the Ingrams intended to be paid to the Illinois defendants." (emphasis added) (Op. 13 fn 9)

In fact there was no evidence, nor did any party, including the prosecutors or the trial court, ever raise the suggestion that severance was not necessary since the defenses were not antagonistic because the intermediary could have kept all the money.

This case presents the opportunity for this court to clarify under what circumstances, and to what degree, "antagonistic defenses" demand a severance. Thus, the decision of the court below, found, relying on its own holding in *United States* v. *Hutul,* 416 F.2d 607, 620 (7th Cir., 1969), *cert. denied,* 396 U.S. 1012, that "antagonistic defenses do not require the granting of severance. (Op. p. 13). In *United States* v. *Johnson,* 478 F.2d 1129, 1131 (5th Cir., 1973), an opposite result was mandated when the defenses were "completely antagonistic."

The decision of the court below here permits the determination of what are "antagonistic defenses" to be modified by a speculative reason or possibility of argument which was never raised by anyone, nor presented to the jury in any fashion. Under such circumstances, a reviewing court may *always* postulate some fact which would remove two otherwise irreconcilable and antagonistic defenses to the prosecution.

While the court below was prepared to rely upon the above-quoted speculation for the purpose of denying the motion for severance, it, nevertheless, failed to honor the contention that such a possibility rose to the significance of a constitutional violation under *Brady* v. *Maryland,* 373 U.S. 83 (see, supra, point A), when the government failed to disclose the information prior to trial. Thus, while it

might have been possible to contend that the intermediary in fact retained some of the $375,000.00, nevertheless, there is no basis upon which to urge that he retained *all* of the funds. As a consequence, the lower court's holding of the possibility of a third alternative to that which would otherwise be mutually exclusive defenses and antagonistic to one another can, at most, be applied only as to part of the amounts involved. In substance then, the lower court has applied a standard, based upon speculation and conjecture, to dispose of the allegation that defenses were mutually exclusive and antagonistic. The application of that improper standard resulted in the Seventh Circuit concluding, "Thus, the Ingram defense was not necessarily antagonistic to the defenses of others, although it was possible, on the Ingrams' theory, that they were innocent even if the others were guilty." (Op. p. 13)

While it is true that wide discretion rests in the trial court in granting a severance of defendants for trial, Rule 14, Federal Rules of Criminal Procedure, *Opper* v. *United States*, 348 U.S. 84, 95, nevertheless such discretion is not without constraints. If the defenses of the co-defendants are, for example, squarely in conflict, a severance is mandated, *United States* v. *Johnson*, 478 F.2d 1129 (5th Cir. 1973), and discretion is thus circumscribed. The judgmental "discretion" of the trial courts has in various instances been described as requiring severance if there is a "sharp conflict between defendants", *United States* v. *DiGiovani*, 544 F.2d 642, 644 (2nd Cir. 1976), or if the defenses are "antagonistic to the extent that they approach being mutually exclusive" *United States* v. *Wilson*, 500 F.2d 715, 723 (5th Cir. 1974), *cert. denied*, 420 U.S. 977. See also, *United States* v. *Ehrlichman*, 546 F.2d 910, 929 (D.C. 1976), *cert. denied*, 429 U.S. 1120; *United States* v. *Mandel*, 415 F. Supp. 1033, 1053 (D. Md. 1976).

It seems equally clear that if there is any doubt whether a co-defendant received a fair trial as a result of the joinder, the conviction cannot stand. *United States* v. *Johnson,* 478 F.2d 1129 (5th Cir. 1973); *United States* v. *Gambrill,* 449 F.2d 1148 (D.C. Cir. 1971); *DeLuna* v. *United States,* 308 F.2d 140 (5th Cir. 1962); *United States* v. *Valdes,* 262 F. Supp. 474 (D.P.R. 1967). But, to what extent may the reviewing Court *create* a factual analysis in order to justify the lower court's discretion denying severance?

Thus the Fifth Circuit states, "if the Appellate Court is left with a definite and firm conviction that a defendant may have been prejudiced by the refusal to give him relief from joinder, it must reverse the conviction". *United States* v. *Johnson, supra* at fn. 8. Again, however, can the reviewing court satisfy its conclusionary finding of lack of prejudice by merely formulating a theory not advanced by any of the litigants or the trial court? If so, such a rule broadens *appellate* discretion beyond that of the trial court and leaves appellants without any real hope that the trial court's discretion can *ever* be found to have been exercised erroneously.

This Court should set the standard once and for all, as to when is severance mandated; when is discretion abused; and, what *is* the ability and scope of the appellate court's review of that discretion?

The court below recognized the postulate laid down by it in *United States* v. *George,* 477 F.2d 508 (7th Cir.), *cert. denied,* 414 U.S. 827, that if the "jury will unjustifiably infer that this conflict alone demonstrates that both are guilty", severance is warranted. Yet the court nevertheless held that the trial below was not such a case. In support of that conclusion, the opinion urged that the

joinder of the parties did not result in the admission of any evidence of consequence that would not have been excludable or admissible in separate trials. (Op. p. 15) How far the appellate court can deviate from the record is demonstrated by this erroneous holding.

Had there been a separate trial, testimony of the co-defendant Frederick B. Ingram would not have been received. Frederick B. Ingram could not have been called upon to give testimony against the Petitioner. As a result, the rebuttal evidence, which the court below condoned, relating to Ingram's bribes of foreign officials (Op. p. 30-36) would not have been admitted, would not have been heard by the same jury considering the issues against Petitioner, and would have failed to leave the jury with the impression that Ingram's criminal disposition was shared by the defendant Janicki.

Moreover, the government's arguments before the jury emphasizing Frederick B. Ingram's foreign activities and payoffs would not have been submitted at a separate trial of the defendant Janicki, nor would any of the contentions raised by Frederick B. Ingram in his own defense have been presented. Thus, the appellate court's suggestion, "nor was any argument made that could not properly have been made in such a separate trial," (Op. p. 14) applies an erroneous standard.

The testimony of an employee of the co-defendant, Ingram, regarding Ingram's authorization of payoffs to a foreign state official was prejudicial to Petitioner and was clearly in error as to him. In rebuttal, and over objection, the former Ingram employee testified concerning Frederick Ingram's involvement with respect to certain improper payments to a Brazilian citizen who worked for a state owned oil company. (Tr. 5665, 5666). The employee described a scenario in which Ingram allegedly received inside information from an official of a "state owned" com-

pany that allowed them to be the low bidder. Ingram in turn deposited funds in a Swiss account for the official. That rebuttal testimony clearly tracked the Government case against Petitioner that, as a public official, he gave inside information to Ingram to allow them to be the low bidder on the sludge contract. This similarity was not lost upon the Court below which conducted its own interrogation of the employee.

The Court:

> Q. "Did Mr. Caniero in fact give you information about the capabilities of your competitors in the effort to secure this contract with Petrobas?"
>
> * * *
>
> Q. "Tell us exactly what kind of information he gave you and what use the Ingram Corporation was able to make of that information?"
>
> * * *
>
> Q. "Of what value was that information to you in your efforts to secure the contract with Petrobas?" (Tr. 5665-5666)

Regardless of the relevance of this testimony with respect to Frederic Ingram, its devastating effect upon Petitioner could not be gainsaid. Petitioner was put in a position where testimony was presented against a co-defendant which he could in no way refute and which he had no relationship with, except for its apparent striking similarity to the prosecution's case against him.

The facts of this case and the holding and criteria applied by the Court below, give rise to a situation whereby the standards as to when an appellate court may refuse to follow the theories of the case in deciding the correctness of a refusal to grant severance should be delineated by this Court.

CONCLUSION

This case presents a unique opportunity for this Court to establish when a prosecutor must disclose exculpatory evidence under the *Brady* holding, and what standards may reviewing courts utilize when deciding the correctness of a lower court's discretionary decision to deny severance. For the reasons stated, the petition for issuance of a writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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